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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1003

WINTHROP TAYLOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PREVIOUS OPINIONS AND ORDERS

The decision of the court below (R. 95) denying *per curiam* a petition for review of the same court's order of April 22, 1935 (R. 87), is unreported. The memorandum opinion of the Board of Tax Appeals in the original proceeding (R. 48–51) is unreported. The opinion of the Circuit Court of Appeals (R. 82–86), affirming the decision of the Board, is reported at 76 F. 2d 904. The order of this Court denying taxpayer's petition for a writ of certiorari to review the Circuit Court's previous decision is reported at 296 U. S. 594. The order of this Court denying taxpayer's

petition for rehearing of the petition for writ of certiorari is reported at 296 U. S. 662.

JURISDICTION

The order of the Circuit Court of Appeals here involved was entered on December 26, 1944. (R. 96.) The petition for a writ of certiorari was filed on March 1, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below had jurisdiction to entertain taxpayer's petition to review and vacate its judgment filed April 22, 1935, affirming the decision of the Board of Tax Appeals, in view of the provisions of Section 1140 of the Internal Revenue Code and in view of the expiration of the term at which the judgment was entered.

2. Whether the court below, if it had jurisdiction, properly denied the petition for review in the exercise of its discretion.

STATUTE INVOLVED

Section 1140 of the Internal Revenue Code is set forth in the Appendix, *infra*.

STATEMENT

This proceeding was revived by the taxpayer in a petition for review by the court below of its judgment entered April 22, 1935 (R. 87), affirm-

ing an order of the Board of Tax Appeals sustaining the Commissioner's assessment of a deficiency in income tax for the year 1929 in the amount of $51,353.70. (R. 48.) Taxpayer, in filing his income tax return for the year in question, reported as capital net gain the sum of $490,006.67 on account of the sale of 14,000 shares of stock of the Public Service Corporation of New Jersey and paid a tax at the rate of 12½ percent. The Commissioner's determination of a deficiency resulted from his treating as ordinary income the amount returned as capital gain. (R. 43–46.) The 14,000 shares were part of a larger quantity of 35,000 shares which petitioner sold during the months of October and November 1929 (R. 84–85) and which had been acquired in smaller lots at various times during the preceding four years, except for 4,500 shares which had been acquired previously (R. 84).

The questions raised by the deficiency assessment were (1) whether the 14,000 shares in question were held primarily for sale in the course of trade or business and (2), if not, whether they were held as capital assets for more than two years. When the case came on for hearing before the Board, counsel for the Commissioner stated the issues (R. 60–61). The Board Member before whom the hearing took place stated that if the taxpayer was not taxable as a trader or dealer in securities, he would nevertheless be taxable upon the gain as income unless he were able to prove

by the history of the stock sold at particular times that the shares in question had been held at least two years. Counsel for the taxpayer stated that "we are prepared to do that up to a certain point". (R. 61–62.) Counsel for the Commissioner offered to accept the "first in, first out" rule, and it was then stipulated that the "first in, first out" rule should apply. (R. 62.)

At the close of the evidence, the Member inquired of taxpayer's counsel whether he thought taxpayer had made out a case and stated that taxpayer's proof did not show all of the purchases and sales. (R. 76–77.) After conference with his client, counsel stated (R. 77):

> If your Honor please, under the circumstances, we are not prepared to prove the rest of these sales for 1929, and it will take some little time to get that proof together, if we were permitted to produce it.

He also asserted that he felt that it was unnecessary to prove how the particular items of gain were made up since the sole point made in the sixty-day letter was whether or not taxpayer was a trader in securities. (R. 77.) To this the Board Member replied (R. 77–78):

> It is too late. That was to be said at the beginning and the point was made very clear and you accepted it. That was the issue, and that is the way you offered your testimony. You agreed with Mr. Morton. You cannot go back now and say that is not true; you have already made your state-

> ment here. That is the issue agreed to; you cannot change that. That is an accepted fact you have presented right here in court.

Taxpayer's attorney then requested "a brief holiday" (R. 78) to prepare further proof and the case was adjourned until two o'clock. After recess taxpayer's counsel stated that he had no further evidence to offer; that he felt the case as it stood was sufficient. (R. 78.) Upon motion of counsel for the Commissioner the petition was then dismissed. (R. 78–79.)

It appears from the present petition for review that during the recess taxpayer had telephoned his office to obtain the records regarding the other 21,000 shares which had been sold, but these could not be found. (R. 23.) He then conferred with his counsel as to the advisability of requesting an adjournment for a sufficient period to permit search for the records. Counsel advised him, however, that this was unnecessary since the missing evidence would only be corroborative of his previous oral testimony. Hence, at the resumption of the hearing, "counsel for the petitioner, confident that he was correct in his attitude, rested his case." (R. 24.) Taxpayer further states that after the original decision of the court below (in April, 1935), the file containing the missing records was discovered in the attic of his home, where it had been removed to make space available in his office. (R. 26.)

The Board sustained the Commissioner on the ground that the evidence did not establish that taxpayer was not a dealer in stocks and upon the further ground that he had not shown that the assets in question had been held for more than two years. (R. 48–51.)

The Circuit Court of Appeals in affirming the order of the Board concluded that the taxpayer was not a trader in securities and based its decision upon the sole ground that he had failed to meet the burden which rested upon him of showing that the stock had been held by him for more than two years. The court specifically rejected taxpayer's contention that the only question in the case was whether he was a trader in securities. (R. 86.)

Taxpayer then petitioned the court below for rehearing on the ground that it had erred in stating that one of the issues in the case was whether the assets had been held for over two years and, further, on the ground that he had proven to a "mathematical certainty" that the 14,000 shares had been held at least two years. (Printed petition for rehearing, p. 6, Docket No. 347, October Term, 1934, Circuit Court of Appeals for the Second Circuit, not included in the present record.) The court below denied the petition for rehearing on May 4, 1935.

Thereafter, substantially upon the same grounds, taxpayer petitioned this Court for a writ of

certiorari (October Term, 1935, No. 183). On October 14, 1935, his petition was denied (296 U. S. 594). A petition for rehearing was likewise denied by this Court on November 11, 1935 (296 U. S. 662).

The petition for review in the court below was filed more than nine years later.[1] It advances the view that, "Under the authority of *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*, [322 U. S. 238], * * * a Circuit Court of Appeals has power at any time, for reasons of justice, to set aside its judgment or devitalize the same and recall its mandate even though the term at which it was entered had long since passed away." (R. 17.) It also avers that since the previous decision taxpayer "has made many and continuous efforts within various departments of the Bureau of Internal Revenue to correct the error [in the decision] and to obtain justice * * * and, as part of these efforts, discovered, tabulated and collated the purchase and sale notices covering the other 21,000 shares sold in October and November, 1929, together with the 14,000 shares, * * *." Taxpayer states that as a result of this tabulation it was discovered that his income tax return for 1929 erroneously understated the capital gain and overstated the ordinary income resulting from the sales of stock

[1] The supporting affidavit is verified December 4, 1944. (R. 29.)

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and that consequently a balance of tax of $3,148.28 was found to be due.

Taxpayer alleges that on April 28, 1942, he submitted to the Commissioner an "offer in compromise" and paid the balance of tax as calculated with interest amounting to $2,298.36. He asserts that in order to qualify the offer as a "compromise", at the suggestion of the Bureau of Internal Revenue, he offered to pay an additional $5,000 in full settlement of the liability. He also asserts that the Internal Revenue Agent in Charge in Brooklyn, New York, recommended acceptance and that the Commissioner of Internal Revenue, New York Division, Technical Staff, "with commendable candor conceded the justice and equity of the petitioner's contentions and that a fundamental error was involved in the decree of this Court but concluded that * * * the Commissioner of Internal Revenue had no authority to compromise or settle tax claims based upon the equities involved * * *" (R. 15–16.)

In his supporting affidavit, taxpayer incorporates a copy of a letter dated October 17, 1944, from the Commissioner, stating that

> Careful consideration has been given to the above offers and they are hereby rejected for the reason that the full amount of the tax liability appears to be collectible. There is no authority in law for the acceptance of a tax legally due for an amount less than can be collected. [R. 28.]

The Commissioner filed an answer in the court below, requesting dismissal of the petition on the ground that the court was without jurisdiction to review its decree. (R. 92–93.) The court denied the petition. (R. 95–96.) Certiorari is sought to review this action.

ARGUMENT

The court below denied the petition without opinion. (R. 95–96.) The denial is correct both on the ground that the court was without jurisdiction to entertain the petition and on the ground that, if the court had jurisdiction, its action was a proper exercise of discretion.

1. It is well settled by decisions of this Court and numerous decisions of the several circuit courts of appeals that pursuant to Section 1140 of the Internal Revenue Code (Appendix, *infra,* pp. 15–17), decisions of the Board become "final" at the times specified, without the qualifications which may exist in regard to ordinary judgments. The section was originally adopted as Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9. Its purpose and effect are expressed in the committee report which recommended its adoption (S. Rept. No. 52, 69th Cong., 1st Sess., p. 37, (1939–1 Cum. Bull. (Part 2) 332, 360)):

> *Date on which decision becomes final.*—Section 1005 prescribes the date on which a decision of the board (whether or not review thereof is had) is to become final.

> Inasmuch as the statute of limitations upon assessments and suits for collection, both of which are suspended during review of the commissioner's determination, commences to run upon the day upon which the board's decision becomes final, it is of utmost importance that this time be specified as accurately as possible. In some instances in order to achieve this result the usual rules of law applicable in court procedure must be changed. For example, the power of the court of review to recall its mandate is made to expire 30 days from the date of issuance of the mandate.

The explicit requirement of the statute deprives the court of its otherwise-existent jurisdiction to grant petitions for rehearing or otherwise exercise the traditional power to review and reconsider a judgment during the term at which it was entered. *Helvering* v. *Northern Coal Co.*, 293 U. S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225. Similarly, we believe, the court below was without jurisdiction to review its own order, and therefore the decision of the Board, for any reason more than nine years after denial of a petition for certiorari by this Court, which the statute specifies as an action that renders the decision of the Board final. Internal Revenue Code, Section 1140 (b) (2), Appendix, *infra*, pp. 15–17; cf. *R. Simpson & Co.* v. *Commissioner*, *supra*. In *Sweet* v. *Commissioner*, 120 F. 2d 77, 81, the Circuit Court of Appeals for the First Circuit said:

> From a reading of § 1005 [of the Revenue Act of 1926, identical with Section 1140 of the Internal Revenue Code] as a whole it is apparent that the old chancery practice with reference to bills of review has no place in the statutory scheme regulating the procedure for adjudicating tax disputes instituted before the Board of Tax Appeals.

To the same effect are *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716, 726, 727; *Crews* v. *Commissioner,* 120 F. 2d 749 (C. C. A. 10th), certiorari denied, 314 U. S. 664; *Swall* v. *Commissioner,* 122 F. 2d 324 (C. C. A. 9th); *McCarthy* v. *Commissioner,* 139 F. 2d 20 (C. C. A. 7th); *Monjar* v. *Commissioner,* 140 F. 2d 263 (C. C. A. 2d); *White's Will* v. *Commissioner,* 142 F. 2d 746 (C. C. A. 3d); cf. *Merrill* v. *United States,* 55 F. Supp. 674 (W. D. N. Y.).

There is no conflict between these cases and *La Floridienne J. Buttgenbach & Co.* v. *Commissioner,* 63 F. 2d 630 (C. C. A. 5th), since the order of the Board there vacated was (p. 631)—

> not really a judgment of the Board representing its ascertainment of facts and application of the law to them, but is the agreement of the parties put into the form of a judgment, the order so reciting. The Board itself has on the face of its record never ascertained what, if any, taxes the taxpayer owed.

Therefore (p. 631):

> We rule only that a redetermination based on a stipulation may be vacated at the instance of the parties to the stipulation for good cause shown.

If the cited case is deemed to go further, it has in effect been overruled by *Helvering* v. *Northern Coal Co., supra,* and *R. Simpson & Co.* v. *Commissioner, supra.* It has, however, been understood more narrowly and distinguished by the other circuit courts of appeals. *Swall* v. *Commissioner, supra; Sweet* v. *Commissioner, supra,* p. 81; *Monjar* v. *Commissioner, supra,* p. 265; *White's Will* v. *Commissioner, supra,* pp. 748, 749.

Hazel-Atlas Co. v. *Hartford Co.,* 322 U. S. 238, upon which taxpayer relies (R. 1–17, 28–29; Pet. 2–5), does not apply, for in that case there was no statute limiting jurisdiction to review. Here, Congress has chosen to fix irrevocably the termination of tax controversies at the times specifically prescribed. These statutory limits may not be disregarded upon petition for review.

Even without the statute, the court below upon well settled principles was without power to entertain the petition for review of its 1935 judgment. Unlike *Hazel-Atlas Co.* v. *Hartford Co., supra,* this is not a case of "after-discovered fraud" (322 U. S. 244), nor are the circumstances in any way similar. The asserted errors lie in

the record. As appears from the Statement, *supra,* they are, first, the consideration by the court below and by the Board of the question whether the stock involved had been held for two years and, second, the conclusion adverse to the taxpayer upon this issue. Neither alleged error involves fraud and both questions were completely litigated in the original proceedings, as the opinion of the Circuit Court of Appeals shows. (R. 82–86.) The same errors were urged originally, not only before the Board and in the argument to the Circuit Court of Appeals, but explicitly in the petition to the court below for rehearing and in the petitions for certiorari and for rehearing filed in this Court. Certainly *Hazel-Atlas Co.* v. *Hartford Co., supra,* does not hold that after the expiration of the term at which a final judgment was entered the court has power to review matters which were in issue and were fully disposed of by the judgment, even if they were incorrectly decided. If such a power existed, litigation would never end. No such jurisdiction exists. *United States* v. *Throckmorton,* 98 U. S. 61, 65–69; *Toledo Co.* v. *Computing Co.,* 261 U. S. 399, 423–424.

2. Even if the court below were deemed to have power to grant the review sought, it committed no abuse of discretion in denying the petition. Incalculable confusion would result from the reopening of old tax cases merely because it was

asserted that questions had been decided incorrectly many years before, when no claim of corruption or fraud is involved

Neither is the claim of newly discovered evidence a sound basis for seeking review in this case now. The evidence was available to the taxpayer by the exercise of diligence prior to the hearing before the Board, since it was at all times completely within his control. At the hearing, he chose not to ask for adjournment to permit him to produce the very evidence now brought forward, but chose, instead, to rest upon the case as presented.

CONCLUSION

The decision below is clearly correct, and there is no conflict. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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